UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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JAMES ALLEN,

Plaintiff,

v.

COUNTY OF TEHAMA (also known as TEHAMA COUNTY), TEHAMA COUNTY COUNSEL'S OFFICE, COUNTY OF TEHAMA BOARD OF SUPERVISORS, NELSON DEAN BUCK, Individually and as the Tehama County Counsel, and DOES 1 through 1,000, inclusive,

Defendants.

NO. CIV. S-03-1294 WBS GGH

MEMORANDUM AND ORDER RE: MOTION FOR ATTORNEYS' FEES

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This action arises out of plaintiff's termination from the position of Deputy County Counsel in the Tehama County Counsel's Office. The court dismissed several of plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") in October 2003, and defendants prevailed on their motion for summary judgment on the remaining claims in December 2004. Defendants now move for an award of attorneys' fees against plaintiff pursuant to 42 U.S.C. §§ 12205 and 1988,

and against plaintiff's counsel, K. Stephen Swenson, pursuant to 28 U.S.C. § 1927 and the inherent ability of the court to sanction attorneys.

I. Factual and Procedural History

Plaintiff was, at all times relevant to this action, employed as a Deputy County Counsel in the Tehama County Counsel's Office. (December 2004 Order at 2). Plaintiff was fired on October 28, 2002 for being "malignant" and for writing improper "meet and confer" letters. (Id. at 3).[1]

A. Plaintiff's Original Complaint

Plaintiff filed suit in this court against defendants in June 2003. (Id. at 4). Plaintiff brought his first five causes of action against all defendants. His first cause of action was a 42 U.S.C. § 1983 claim for violations of his constitutional rights under the First, Fourth, Fifth, and Fourteenth Amendments. (Compl. ¶¶ 25-31). In his second cause of action, plaintiff also invoked § 1983 and claimed that he had been deprived of a property interest without due process. Plaintiff claimed a constitutionally protected property interest in payment for one day of unused vacation time, payment that he alleged was still owing. (Id. ¶¶ 32-36). In his third cause of action, plaintiff invoked 42 U.S.C. § 1985, alleging that defendants had conspired to deprive him of his civil rights. (Id. ¶¶ 37-44). His fourth cause of action alleged a violation of California Labor Code § 1102.5, a whistleblower protection statute. (Id. ¶¶ 45-51). The fifth cause of action was for what

[1] A more complete recitation of the facts leading to this suit can be found within previous court orders.

plaintiff labeled "torts in essence." (Id. ¶¶ 52-59).

Plaintiff alleged his sixth through ninth causes of action against all defendants except Buck. The sixth cause of action was for "negligent employment/retention/supervision"; plaintiff's theory was that defendant Tehama County Counsel negligently retained Allen's supervisor Buck after Buck was diagnosed with cancer. (Id. ¶¶ 60-66). Plaintiff's seventh cause of action was for breach of contract. (Id. ¶¶ 67-70). Plaintiff's eighth cause of action was for disability discrimination in violation of the Fair Employment and Housing Act (the "FEHA"), Title VII of the Civil Rights Act, and the Americans with Disabilities Act (the "ADA"). (Id. ¶¶ 71-80). Plaintiff's ninth cause of action, styled "wrongful termination in violation of public policy," was a restatement of plaintiff's ADA, § 1983, FEHA, and common law claims. (See id. ¶¶ 81-86). Plaintiff sought relief in the form of general and special damages, costs and attorneys' fees, punitive damages, and interest. (Id. (Prayer for Relief)).

B. The October 2003 Order

Defendants moved to dismiss, pursuant to Rule 12(b)(6), all of plaintiff's claims except for those for disability discrimination The court issued its order on this motion on October 8, 2003.

The court dismissed plaintiff's § 1983 claim alleging violations of the First, Fourth, and Fifth Amendments. (October 2003 Order at 24). The court reasoned that, since the government may regulate the speech of its employees when they are speaking on behalf of the government, defendants did not violate

plaintiff's constitutional rights when they restrained him from writing improper "meet and confer" letters to opposing counsel. Id. at 7-8; see Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819 (1995). Plaintiff's Fourth Amendment claim was dismissed because plaintiff alleged neither a search nor a seizure. (October 2003 Order at 8). The court also dismissed plaintiff's claim arising under the Fifth Amendment due process clause. Plaintiff's due process claim was properly analyzed under the Fourteenth Amendment. The court also dismissed plaintiff's § 1983 claim invoking the Fourteenth Amendment right to procedural due process in relation to his termination. (Id. at 24). The court found plaintiff to be an at-will employee with no property interest in his job. (Id. at 11). Finally, all of plaintiff's claims under state law were dismissed except for that arising under the FEHA. (Id. at 24-25).

The October 2003 order permitted some claims to go forward. Defendants did not challenge the claims based on disability discrimination, and therefore those claims survived. Defendant's motion to dismiss the § 1985(3) action was granted, but plaintiff was permitted to amend his complaint to reallege a claim under that statute. (Id. at 24). Finally, the court held that plaintiff's § 1983 allegation that defendants had wrongfully deprived him of pay for his unused vacation time stated a claim, and therefore defendant's motion on this point was denied. Id.

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C. Plaintiff's First Amended Complaint

Plaintiff's first amended complaint ("FAC"), filed November 7, 2003, contained four causes of action. In the first cause of action, under § 1983, plaintiff claimed that all defendants had deprived him of a liberty right in his reputation. (FAC ¶¶ 28-37). This first cause of action in the FAC was not included in the original complaint. Plaintiff's second cause of action claimed that defendants had deprived him of pay for his unused vacation time without affording him due process. (Id. ¶¶ 38-42). Plaintiff's third cause of action restated the § 1985 claim in the original complaint, but this time more clearly alleged that defendants had conspired to discriminate against plaintiff. (Id. ¶¶ 43-51). Plaintiff's fourth cause of action, against all defendants except Buck, was based on the ADA, the FEHA, and Title VII. (Id. ¶¶ 52-61).

D. The December 2004 Order

The court granted summary judgment to defendants on all causes of action in an order filed December 28, 2004. Regarding plaintiff's first claim, that he had been deprived of a liberty interest in his reputation, the court held that the level of stigmatization that plaintiff alleged he suffered at the hands of defendants was not enough to get to the jury on a Roth stigmatization claim. (December 2004 Order at 5-9); see Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). At worst defendants had told others that plaintiff was "malignant" and was "more of a detriment than an asset" to his employer. (Id. at 7-

8).[2]

Plaintiff's second cause of action was that he had been deprived of pay for one day of unused vacation without due process of law. The court held that, although plaintiff had a property interest in that day's pay, plaintiff had not taken advantage of the process that was available to him to protect his interest. (Id. at 14). The court also held that plaintiff received the process due him under the Constitution. (Id. at 16).

The court granted defendants summary judgment on plaintiff's disability discrimination causes of action because plaintiff had suffered no injury as a result of defendants' conduct. (Id. at 16-21). Plaintiff admitted that "Mr. Allen's vision problems did not play a role in Mr. Buck's decision to terminate Mr. Allen." (Id. at 17-18)(quoting Pl.'s Response to Def.'s Am. Statement of Undisputed Facts at ¶ 168). Because plaintiff did not show that he suffered an adverse employment action as a result of his disability, plaintiff did not make a prima facie case under the ADA. (Id. at 18); see Sanders v. Arenson Prods., 91 F.3d 1351, 1353 (9th Cir. 1996). The court granted defendants summary judgment on the FEHA claim because plaintiff had no standing to bring the claim. (December 2004

[2] Defendants vigorously argued in their motion for summary judgment, and again in this motion, that plaintiff also failed to show the publication element of the Roth stigmatization claim. The court did not reach that issue in its December 2004 order.

Order at 19-21).[3]

Similarly, defendants were granted summary judgment on plaintiff's § 1985 claim because he was not deprived of any right or privilege due to his disability and therefore was not injured. (Id. at 22). In addition, plaintiff showed no conspiracy against disabled persons. (Id.).

II. Discussion

A. The Standard Under 42 U.S.C. §§ 1988 and 12205

Attorneys' fees may be sought only against the losing party, but not his counsel, under §§ 1988[4] and 12205.[5] Roadway Exp., Inc. v. Piper, 447 U.S. 752, 756-57 (1980). In contrast, 28 U.S.C. § 1927 "deals only with attorney conduct and involves taxing costs against counsel." Id. at 757.

In the context of civil rights statutes, strong policy considerations support awarding attorneys' fees to prevailing

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[3] The court also granted summary judgment to defendants on plaintiff's Title VII claim because Title VII does not cover employment discrimination based on disability. (December 2004 Order at 16 n.9).

[4] In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .

42 U.S.C. § 1988.

[5] In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

42 U.S.C. § 12205.

plaintiffs. See Christiansburg Garment Co. v. EEOC, 434 U.S. 411, 418 (1978)(interpreting the fees shifting provision of Title VII, and holding that "plaintiff is the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority")(citation omitted). These policy considerations are not present when a court considers awarding attorneys' fees to a prevailing defendant in a civil rights case. Id. at 418-19. Therefore, a prevailing defendant in a civil rights case may recover only where the plaintiff's action was "frivolous, unreasonable, or without foundation." Id. at 421. An action is "frivolous" where it lacks an arguable basis in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989). The court need not find that plaintiff brought his action(s) in subjective bad faith to award fees to defendant. Christiansburg, 434 U.S. at 421. But "if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." Id. at 422(emphasis in original). Where some claims are frivolous and others are not, the court may award fees for the charges incurred as a result of defending the frivolous claims if the frivolous claims are separable from those that are not. See Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)("unrelated claims [must] be treated as if they had been raised in separate lawsuits").

In analyzing a claim to determine whether it is frivolous, a court must resist any temptation to engage in post hoc reasoning. Christiansburg, 434 U.S. at 421-22. "Even when the law or the facts appear questionable or unfavorable at the

outset, a party may have an entirely reasonable ground for bringing suit." Id. at 422. However, a plaintiff cannot simply bury his head in the sand before filing a civil rights claim; he has the duty, through his attorney, to make a reasonable inquiry into the applicable facts and law before filing his action. Margolis v. Ryan, 140 F.3d 850, 854 (9th Cir. 1998); see also Fed. R. Civ. P. 11.

The claim need not be frivolous at the time of filing for defendant to recover under Christiansburg. "Under the Christiansburg standard, a prevailing defendant may also be entitled to fees if the plaintiff continued to litigate the suit after it clearly became frivolous." Marbled Murrelet v. Babbitt, 182 F.3d 1091, 1096 (9th Cir. 1999).

Although Christiansburg applied this "frivolous or unreasonable" test to a case brought under Title VII, the Ninth Circuit has applied it to cases in which defendants sought attorneys' fees under § 1988 and the ADA. Margolis, 140 F.3d at 854(§ 1988); Summers v. A. Teichert & Son, Inc., 127 F.3d 1150, 1154 (9th Cir. 1997)(ADA).

B. Applying the Christiansburg Standard

1. The dismissed claims

Plaintiff's original complaint alleged nine causes of action, and plaintiff's FAC alleged one more. Defendants do not move the court for attorneys' fees in connection with the five state law causes of action, but only in connection with the ADA claim, the § 1983 claims, and the § 1985(3) claim.

Plaintiff's § 1983 claim invoking the First, Fourth, and Fifth Amendments was frivolous. Plaintiff himself apparently

thought so little of these claims that he did not bother to defend their merit in his opposition to the motion to dismiss. Not only was the First Amendment claim foreclosed by the Supreme Court in Rosenberger, it defies common sense to argue that a lawyer employed by a county has an unfettered First Amendment right to insert whatever language he chooses into papers he files on behalf of the county. Plaintiff's Fourth Amendment claim was also frivolous: he never alleged any search or seizure. Plaintiff's Fifth Amendment claim was frivolous because it was entirely duplicative of his Fourteenth Amendment due process claim. It is black letter law that the due process clause of the Fifth Amendment applies to the federal government and the due process clause of the Fourteenth Amendment applies to the states. See Valdez v. Rosenbaum, 302 F.3d 1039, 1044 fn.2.

Plaintiff advanced two theories under § 1983 as to why his Fourteenth Amendment right to due process was violated. Plaintiff alleged that he had both a property interest in his job and in his unpaid vacation time. He alleged that defendants deprived him of these property interests without due process. The first Fourteenth Amendment cause of action, that he had a property interest in his job, was not frivolous under the Christiansburg standard. Although the court held plaintiff to be an at-will employee under the county code and also held that a Memorandum of Understanding ("MOU") did not apply to plaintiff as to the procedure his employer had to follow when terminating him, it was understandable that plaintiff would misinterpret this MOU. (See October 2003 Order at 9-11). In fact, the court found that the MOU applied to the salary, vacation, medical, and other

benefits of employment that plaintiff received. (December 2004 Order at 11).[6]

2. Plaintiff's *Roth* stigmatization claim

After this court's October 2003 order, plaintiff filed his FAC alleging four causes of action. His claims included a due process claim for his unpaid vacation time, a § 1983 claim based on his liberty interest in his reputation, a § 1985 claim alleging a conspiracy to deprive plaintiff of equal protection of the laws, and a disability discrimination claim.

It is a close question whether plaintiff's stigmatization claim was frivolous. All that plaintiff alleged in his FAC was that, at worst, defendants informed others that plaintiff had written "improper meet and confer letters" and that plaintiff was "malignant" and "more of a detriment than an asset" to his employer. (December 2004 Order at 7-8). The court found that these comments did not rise to the level of stigmatization required by Roth and its progeny. (Id. at 9). A claim alleging stigmatizing charges of "insubordination, incompetence, hostility towards authority, and aggressive behavior" is not enough to support a Roth stigmatization claim, Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 806 (9th Cir. 1975), and the comments plaintiff claims damaged his reputation fall short of these types of charges. Indeed, an attorney being called "malignant" is hardly damaging at all. In the world of aggressive litigation, some clients may want the most malignant

[6] The second Fourteenth Amendment theory advanced by plaintiff, that he was denied pay for his unused vacation time and that the MOU did not afford him due process, survived the motion to dismiss and is discussed below.

lawyer they can find.

Plaintiff argues that his claim was not frivolous because the Roth stigmatization threshold should be lowered for attorneys in small legal communities like Tehama County. He argues that no other legal employer in the area would hire him after it became known that he had written improper meet and confer letters. The Ninth Circuit does not consider the size of the community in determining whether a plaintiff has a viable stigmatization claim. In Gray, for example, the plaintiff was a special education school teacher in a rural county. 520 F.2d at 804. Gray did not hold that the small size of the Union County educational community was a distinguishing factor lessening the standard by which comments are adjudged to be stigmatizing.

In light of the Christiansburg standard, however, the court does not find that plaintiff's Roth stigmatization claim was frivolous. Although this court's reading of the law forecloses plaintiff's arguments, plaintiff could have argued to the Ninth Circuit that a lawyer's good name is his primary asset, and that the standards for lawyers in small communities should be different.

3. Plaintiff's ADA claim

The next question is whether the claims made under the ADA were frivolous.[7] After eighteen months of litigation,

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[7] Plaintiff might argue that his claims were also made under the California FEHA, and that therefore the attorneys' fees analysis must be analyzed under that standard. However, the standard is the same for awarding attorneys' fees to prevailing defendants under both the ADA and the FEHA. Moss v. Associated Press, 956 F.Supp. 891, 893 (C.D. Cal. 1996)("The court's discretion in granting attorney fees to a prevailing defendant

plaintiff finally admitted on December 20, 2004 that "Mr. Allen's visual problems [related to his diabetes] did not play a role in Mr. Buck's decision to terminate Mr. Allen." (See Pl.'s Response to Def.'s Am. Statement of Undisputed Facts at ¶ 168)(plaintiff responded that the quoted statement was "[u]ndisputed for the purposes of this motion"). This was not a typographical error. At the hearing on defendants' motion for summary judgment, the court and plaintiff's counsel had the following exchange:

> THE COURT: Are you retracting your statement, then? [Defendants' counsel] Mr. Smith points out that you admitted that his [plaintiff's] termination had no relation to his disability.
>
> MR. SWENSON: Your Honor, no, I don't do that. And, in fact, in all candor, we don't have direct evidence of that, and that's what this admission is. We concede that point, there is not direct evidence."

(Rep.'s Tr. on Mot. for Summ. J. at 9). Later in the hearing, plaintiff's counsel also conceded that plaintiff "was able to perform the essential functions of his job with or without [any] accommodations." (Id. at 12).

Defendants have made a strong argument that the ADA claim was frivolous from its inception. Plaintiff was told that he was terminated because he was malignant and had written improper letters to opposing counsel. (December 2004 Order at 3). There was a good deal of evidence accessible to plaintiff at the time he filed suit that tended to show that these were the real reasons for his termination. Plaintiff's supervisor Buck had told plaintiff numerous times throughout plaintiff's tenure as a deputy counsel that his litigation style was objectionable.

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under the California FEHA is governed by the Supreme Court's decision in Christiansburg").

(See Pl.'s Response to Def.'s Am. Statement of Undisputed Material Facts ¶ 27, 31-35, 39, 43, 45, 52, 56, 58-59, 62-67, 87, 100)(admissions of plaintiff).

Plaintiff now argues that minor discrepancies in what Buck and others said about plaintiff's termination and how the office sought to accommodate plaintiff's disability led plaintiff to believe that the reasons Buck gave him for his dismissal were a pretext. The court has serious questions about this line of argument because of the overwhelming evidence that plaintiff was fired due to his job performance. Nevertheless, given the policy considerations highlighted in Christiansburg, and Christiansburg's admonition to courts to avoid the temptation to engage in post hoc reasoning, the court accepts plaintiff's reasoning and finds his ADA claim not frivolous.

4. Plaintiff's § 1985 Claim

Plaintiff's § 1985(3) claim was not frivolous. Plaintiff does not dispute that "Mr. Buck was the only person involved in the decision to terminate [plaintiff]." (Pl.'s Response to Def.'s Am. Statement of Undisputed Material Facts ¶ 99). In his opposition, plaintiff does not dispute that this claim was frivolous. (Pl.'s Opp'n to Def.'s Mot. for Attorneys' Fees). However, because the court finds plaintiff did not file his disability discrimination cause of action frivolously, and because evidence of the lack of conspiracy may have only become available to plaintiff late in the litigation, the court finds

plaintiff's § 1985 not frivolous.[8]

5. Plaintiff's Due Process Claim For Unpaid Vacation Time

Defendants concede that plaintiff's due process claim for the $275 in unpaid vacation time was plausible. (Defs.' Mot. for Attorneys' Fees at 2). The court agrees. Although plaintiff did not follow the procedure outlined in the MOU to recover the money, and although the court held that procedure to adequately protect plaintiff's property interest, (see December 2004 Order at 11-16), this outcome was not so obvious as to render the claim frivolous.

C. Claims for Attorneys' Fees Under § 1927 and the Court's Inherent Power

Section 1927 of Title 28 provides:

> Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Section 1927 does not displace the court's inherent power to sanction attorneys. Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991). That inherent power includes the power to impose attorneys' fees but is limited to situations where the litigant has acted in bad faith or in willful disobedience of a court's orders. Id. at 47. Where an attorney files frivolous pleadings, the inherent power of the court may be used to sanction the attorney. In re Keegan Mgmt. Co. Sec. Litig., 78 F.3d 431, 435

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[8] Defendants might also argue that plaintiff does not belong to a class protected by § 1985(3). (See December 2004 Order at 21-22). However, plaintiff could have made a good faith argument that the disabled should be protected by § 1985(3).

(9th Cir. 1996).

In the Ninth Circuit, attorneys' fees may only be awarded to the opposing party under § 1927 when a court finds that an attorney acted in bad faith. New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1306 (9th Cir. 1989). "Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent." Id. (citation omitted). For fees to be awarded under § 1927 against an attorney, there must be a causal link between the attorney's multiplication of the action and the fees incurred by the other party. Kirschner v. Uniden Corp. of Am., 842 F.2d 1074, 1081 (9th Cir. 1988).

Section 1927 fees cannot be charged an attorney on the basis of frivolous pleadings. In re Keegan Mgmt. Co. Sec. Litig., 78 F.3d 431, 435 (9th Cir. 1996)(reasoning that it is the multiplication of proceedings that makes an attorney liable for attorneys' fees under § 1927). Where an attorney proceeds to litigate a cause of action after being made aware of its frivolity by opposing counsel, a court may find him liable for attorneys' fees under § 1927. Schutts v. Bently Nevada Corp., 966 F.Supp. 1549, 1559-60 (D. Nev. 1997)(citing Trulis v. Barton, 67 F.3d 779, 788 (9th Cir. 1995)).

Mr. Angelo alleges numerous instances of bad faith on the part of Mr. Swenson. (See Angelo Decl. in Supp. of Mot. for Attorneys' Fees). Angelo alleges that Swenson routinely refused to return his phone calls and faxes, was dilatory in responding to defendants' discovery requests, and refused to extend discovery to allow defendants to take a deposition to preserve

the testimony of defendant Buck, who had been diagnosed with two forms of cancer. (See id.). Angelo effectively argues that Swenson did not extend any professional courtesies to Angelo's firm in the discovery process. He also effectively argues that Swenson asked some argumentative questions at depositions. However, the court finds that these behaviors alone do not rise to the level of subjective bad faith required to impose § 1927 liability upon Swenson.

Some of defendants' allegations, however, do raise serious questions about Swenson's conduct during this litigation. First, Swenson signed and filed a complaint alleging that defendant County of Tehama had negligently retained defendant due to his being diagnosed with cancer. This cause of action made a matter of public record Buck's personal medical information, including his chemotherapy and radiation treatments, and also accused Buck of having "impaired abilities and judgment" due to his cancer. (See compl. ¶¶ 61-62). Not only was the county immune from the cause of action, (October 2003 Order at 21-22), but plaintiff had no facts showing that Buck had "impaired abilities and judgment." (See Pl.'s Opp'n to Defs.' Mot. to Dismiss)(not addressing this cause of action at all). The court dismissed this claim in its October 2003 order.

While attorneys' fees are not available to defendants under § 1927 on the basis of the filing of the negligent retention cause of action, the court may use its inherent power to sanction Swenson. See In re Keegan, 78 F.3d at 435. However, the use of the court's inherent power to sanction attorneys is an extraordinary remedy that should only be exercised with extreme

caution. Id. Although this cause of action seems to have been inserted to harass defendants, the court finds that its inclusion does not warrant the court's use of the extraordinary remedy of ordering Swenson to pay attorneys' fees to defendants.

Defendants' next allegation that warrants closer scrutiny is the letter that Swenson authored, signed, and sent to defendants' counsel Angelo on September 14, 2004. (See Angelo Decl. in Supp. of Defs.' Mot. for Attorneys' Fees Ex. C (Swenson September 2004 letter)). That letter contains the following passage:

> The defendants and your law firm can also avoid the risks attending the actual, existing, material factual conflicts your firm has in representing defendants with conflicting versions under penalty of perjury regarding material facts:
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> [In the next paragraph, plaintiff shows that some of defendants' witnesses said conflicting things. The court found the allegations of conflict of interest to be without merit. (December 2004 Order at 10 n.5)]
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> Settlement "hides a lot of sin," and your firm benefits by not having to deal with the conflict issues . . .

(Id. at 2-3)(emphasis in original). The language in this letter violates California Rule of Professional Conduct 5-100, which provides that "[a] member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute." However, the letter itself does not multiply the proceedings, and defendants' counsel conceded as much at oral argument. Therefore, awarding attorneys' fees under § 1927 would be contrary to the language of that statute. The court also declines to exercise its discretion to award attorneys' fees under its inherent power because Swenson's letter is not related to the attorneys' fees that defendants incurred.

Finally, defendants allege that Mr. Swenson acted in bad faith with regard to his knowledge of the frivolity of the claims. In a letter dated July 6, 2004, defendants' counsel sent Swenson a letter noting that discovery had closed and outlining the strong case against Swenson's client. (Angelo Decl. in Supp. of Defs.' Mot. for Attorneys' Fees Ex. A (Smith July 2004 letter)). His continued prosecution of a case he knew to be frivolous left Swenson susceptible to liability for attorneys' fees under § 1927. Schutts, 966 F.Supp. at 1560.

The reality of this unique case, however, leads the court not to award attorneys' fees under § 1927 to defendants on the basis of Swenson's knowledge of the strong case against his client. Over the course of the last 22 months, the court has had the opportunity to observe plaintiff Allen, his attorney Swenson, and the management of the case. It has become increasingly clear that Allen, a licensed attorney, was calling the shots during this litigation. Therefore, if Swenson, after reading Smith's letter, had refused to further prosecute the case, the court is convinced that Allen would have proceeded to litigate the case on his own or found another attorney to do so. That state of affairs would have led to further delays and would have had no salutary effect on the number of motions and documents filed. Swenson's continued representation of Allen did not, therefore, multiply the proceedings. The court also does not impose sanctions on Swenson on the basis of its inherent power.

D. Calculation of Reasonable Attorneys' Fees

Where attorneys' fees are appropriate, the district court is to determine their amount by using the lodestar method -

the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Hensley, 461 U.S. at 433 (1983). There is a strong presumption that the lodestar amount is reasonable. Fischer v. SJB-P.D., Inc., 214 F.3d 1115, 1119 n.4 (9th Cir. 2000). The court may adjust the lodestar figure if various factors overcome the presumption of reasonableness.[9] Hensley, 461 U.S. at 433-34.

Where a prevailing defendant is awarded attorneys' fees in a civil rights action, the financial resources of the plaintiff should be considered. Patton v. County of Kings, 857 F.2d 1379, 1382 (9th Cir. 1988). The award should not subject the plaintiff to financial ruin. Id.

The court computes the attorneys' fees due defendants for the effort they expended in defending against the frivolous claim. See Hensley, 461 U.S. 424, 435 (1983)("unrelated claims

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[9] The court may adjust the lodestar figure on the basis of the Kerr factors:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70 (9th Cir. 1975). Many of the Kerr factors have been subsumed in the lodestar approach. Cunningham v. County of Los Angeles, 879 F.2d 481, 487 (9th Cir. 1988). Moreover, the court should consider the factors established by Kerr, but need not discuss each factor. Sapper v. Lenco Blade, Inc., 704 F.2d 1069, 1073 (9th Cir. 1983).

[must] be treated as if they had been raised in separate lawsuits"). The court adopts the method used in Schneider v. Elko County Sheriff's Department. See 17 F.Supp. 2d 1162, 1166 (D. Nev. 1998). Schneider found the most natural way to calculate attorneys' fees in a situation with separable frivolous and non-frivolous claims is to "compar[e] the amount of the motion for partial summary judgment devoted solely to the [frivolous claims] to the amount devoted to legal argument on all other claims." Id. Schneider went on to divide the number of lines in the motion devoted to the frivolous claims by the total number of lines in the motion, and then multiplied that percentage by the lodestar amount. Id.

Defendants have presented the court an itemized list, from July 8, 2003 to the present, of the fees charged their clients. (Smith Decl. in Supp. of Defs.' Mot. for Attorneys' Fees Ex. A (fee invoices)). Partners at the law firm of Angelo, Kilday and Kilduff charged $150 per hour, associates charged $130 per hour, and paralegals charged $75 per hour. The total billed on this matter is $206,956.25. Id. ¶ 2. Defendants would offset this amount by the $600 already recovered in sanctions against plaintiff's counsel, so they seek $206,356.

Plaintiff does not object to the rates charged by defendants' counsel. (Pl.'s Opp'n to Defs.' Mot. for Attorneys' Fees at 27-28). Indeed, the court finds those rates to be extremely reasonable under the circumstances. Plaintiff does not point to any specific charge he considers excessive, but he makes the argument that defendants' fees must be inflated because $206,325 is too much to pay to defend against frivolous and

groundless claims. First, the court notes that plaintiff's open-ended discovery requests tended to produce these kinds of fees.[10] Second, plaintiff's counsel's tendency to not return phone calls or faxes and to fight every step of the way on minor discovery matters also tended to make defendants' fees balloon. (See Angelo Decl. in Supp. of Mot. for Attorneys' Fees ¶¶ 3-89).

Plaintiff might also argue that the fees defendants incurred after December 28, 2005 should not be recoverable. However, the fees incurred by defendants in preparing a motion for attorneys' fees are recoverable against the plaintiff where the plaintiff has pursued a frivolous civil rights claim. Schutts, 966 F.Supp. at 1565. The court finds the entire $206,325 to have been reasonably expended.[11] Neither plaintiff

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[10] On May 1, 2004, Plaintiff served nine sets of discovery on Defendants, including requests for production of documents, special interrogatories and requests for admissions. It was the first discovery initiated by Plaintiff during the entire litigation. Responses to all sets of discovery were due June 3, 2004. The special interrogatories consisted of 155 interrogatories when subparts were counted under Fed. R. Civ. Proc. 33(a). The requests for production demanded 74 categories of documents, very few of which required singular responses such as particular books or letters. The requests for admissions requested the admission of 122 alleged facts. Although many of the requests were similar or the same between defendants, many were not. A full response required production of a large number of documents and a review of almost all of the litigation correspondence in matters handled by James Allen as a Tehama Deputy County Counsel.

(Angelo Decl. in Supp. of Mot. for Attorneys' Fees ¶ 47).

[11] There was a safeguard in place to prevent defendants' fees from being inflated. Tehama County has kept current in their payments to Angelo, Kilday, & Kilduff, and so has had an interest in keeping taxpayer expenditures on this matter to a minimum. (See Smith Decl. in Supp. of Defs.' Mot. for Attorneys' Fees Ex. A (fee invoices))

nor defendants argue that the court should adjust this lodestar figure based on the Kerr factors. The court has considered the Kerr factors and holds that they do not provide grounds for adjusting the lodestar amount.

The court proceeds to compute the fees plaintiff must pay defendants for filing and pursuing a frivolous claim under Schneider. See 17 F.Supp. 2d at 1166 (D. Nev. 1998). The only frivolous claim on which defendants may recover their fees was dismissed on October 8, 2003. (See October 2003 Order at 24)(dismissing plaintiff's § 1983 claims based on the First, Fourth, and Fifth Amendments).

Not counting the preliminary exposition of facts, defendants' motion to dismiss contains 84 lines dedicated to the frivolous § 1983 claim out of a total of 625 lines dedicated to argument, for an approximate percentage of 13.4%.[12] The total billed from the inception of the suit to October 7, 2003 was $35,517. (Smith Decl. in Supp. of Defs.' Mot. for Attorneys' Fees Ex. A (fee invoices)). Therefore, defendants are entitled to $4,759 for this period.

Because there were no other frivolous claims, defendants are due $4,759 for the period between this case's inception and Decmeber 27, 2004, the date defendants were granted summary judgment on the remaining causes of action. This amount is 2.8% of the $172,545 in total fees incurred by defendants for

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[12] The court rounds this and following numbers to reflect the necessarily inexact nature of the court's determination of the amount of time spent on frivolous and nonfrivolous claims. The number of lines spent on a given argument is not always determinative, but is a good indicator in this case.

that time period. Applying that 2.8% figure to the remaining $34,411.25 incurred from December 28, 2004 to January 26, 2005, the date of this motion's submission to the court, plaintiff owes additional attorneys' fees of $964 for this period.

Therefore, the court computes that plaintiff owes defendants attorneys' fees in the amount of $4,759 + $964 = $5,723.

The next question is how much, if at all, the court should discount these awards for plaintiff's income. Plaintiff has filed a supplemental declaration in which he states his net worth and his annual salary. In 2004 plaintiff had an adjusted gross income of $101,162. His annual salary is $110,000. His wife, whom he supports, does not work. He does not own a home, and his other assets, including his retirement account, do not exceed $75,000. His annual medical expenses exceed $15,000.

This is not the financial picture of a man who is extremely wealthy, nor is it one of a man living in poverty. The court finds that a sanction of $5,723 against Allen would not subject him to undue financial hardship. Compare Schutts, 966 F.Supp. at 1553, 1565(finding that plaintiff convicted felon, who did not have independent means, could afford attorneys' fees award of $6,281).

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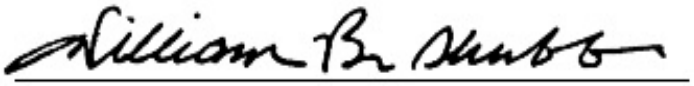
IT IS THEREFORE ORDERED that defendants' motion for attorney's fees and costs be, and the same hereby is, GRANTED in the amount of $5,723 against plaintiff James Allen.

DATED: April 15, 2005



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE